KARUNAIRAJAH RASIAH

v.

PUNITHAMBIGAI PONIAH

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: B-02-891/1999]
11 FEBRUARY 2003

FAMILY LAW: *Children - Maintenance - Legal duty of parent to maintain child - Whether ceased upon child attaining age of 18 years - Maintenance of child over 18 years on account of "physical or mental disability" - Meaning of "physical or mental disability"- Child's involuntary financial dependence for purpose of pursuing tertiary education - Whether constituted 'physical disability' under the law - Law Reform (Marriage and Divorce) Act 1976, ss. 92, 95*

WORDS & PHRASES: *"Physical or mental disability" - Section 95, Law Reform (Marriage and Divorce) Act 1976 - Meaning and import*

By a maintenance order dated 30 January 1997 ('the Order'), the appellant agreed to pay a monthly maintenance of RM 1400 to each of his three children. Subsequently, one of the children ('Anitha') attained the age of 18 years, whereupon the appellant ceased to maintain her stressing that he was no longer legally liable to do so under the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). It was not in dispute that by s. 95 of the Act, unless Anitha had suffered from a physical or mental disability, the appellant's legal duty to maintain her would cease when she reaches the age of 18 years. The facts however showed that Anitha was then pursuing her "A" levels in the United Kingdom, and was set to pursue tertiary education subsequently. This being the case, the respondent petitioner argued that the appellant's duty to maintain did not cease, as Anitha was suffering from a kind of physical disability, namely involuntary financial dependence, and in the circumstances applied for Anitha's continued maintenance beyond the age of 18 years. Upon the authority of *Ching Seng Woah v. Lim Shook Lin*, the learned judge agreed with the respondent's contention, and consequently varied the Order and extended the maintenance payment beyond the age of 18 years in the event that the children gain a place in an educational institution of higher learning. The appellant appealed and argued that the trial judge was wrong in deciding the way he did, citing in support thereof the case of *Gisela Gertrud Abe v. Tan Wee Kiat*. The primary

issue that arose was whether, upon a proper interpretation of s. 95 of the Act, the Order herein ought to expire *pro tanto* upon the attainment by each child of the age of 18 years.

Held:
Per Abdul Kadir Sulaiman JCA

[1] *Gisela Gertrud Abe* ought to be distinguished as the courts there applied the general principle in s. 95 without having the benefit of argument on the disability exception contained in the section. (p 256 g-h)

[1a] We would associate with the views expressed by the Court of Appeal in *Ching Seng Woah* that in appropriate cases, involuntary financial dependence is a physical disability under s. 95 of the Act. Indeed, the matter before us is such a case. We would go a step further and say that this involuntary financial dependence can also be taken as a mental disability under the section for the purpose of the child of the marriage pursuing their tertiary education. Certainly, it needs able body and mind to undergo a tertiary education. (pp 256 h-i & 257 a)

[2] If the marriage had not gone to the rock, the appellant would surely not have left his children to wander in the street to fend for themselves upon their attaining the age of 18 years. Bearing this in mind, it could not have been the intention of the legislator in incorporating the provisions of s. 95 into the Act to make the children worst off in the event of a break-up of marriage of their parents, as compared to children living together with their parents under the same roof. Therefore, the learned judge was correct in so making his order extending, in the circumstances, the payment of maintenance to the child beyond the age of 18 years for the reason given. (pp 257 f-i & 258 a)

[3] The maintenance payments by the appellant will cease the moment the said children or any of them could fend for themselves. What this means is that, the children could not be expected to remain idle without any effort made to stand on their feet. In such a situation, without any physical or mental disability, in the sense interpreted earlier, it is appropriate that s. 95 of the Act would apply in that the maintenance in respect of them would cease on their attaining the age of 18 years. On the other hand, if the children fail to fend for themselves upon attaining the age of 18 years for the opportunity available to further their education for a better future in life, then in not doing so, they cannot be deprived of their maintenance by the parent. (p 258 f-g)

[3a] In the light of the aforesaid, therefore, in certain circumstances such as the present, s. 95 of the Act should not be looked at in isolation. The section should be construed more liberally in the light of the duty imposed upon the parent to maintain their children as embodied in s. 92 of the Act. This court therefore agrees with the views as expressed by the learned judge in arriving at his decision herein. (p 258 h)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Melalui suatu perintah nafkah bertarikh 30 Januari 1997 ('Perintah'), perayu bersetuju membayar nafkah sebanyak RM 1400 sebulan bagi setiap tiga orang anaknya. Salah seorang anaknya ('Anitha') kemudian mencapai umur 18 tahun, dan berikutnya perayu enggan meneruskan penafkahan anaknya itu atas alasan bahawa beliau tidak lagi bertanggungan untuk berbuat demikian di bawah peruntukan Akta Pembaharuan (Perkahwinan dan Perceraian) 1976 ('Akta'). Tidak dinafikan bahawa berdasarkan s. 95 Akta, kecuali Anitha mengalami ketidakupayaan fizikal atau mental, tanggungjawab perayu untuk menafkahinya berakhir sebaik sahaja ia mencapai umur 18 tahun. Fakta bagaimanapun menunjukkan bahawa pada waktu material Anitha sedang mengikuti kursus "A" levels di United Kingdom, dan berkemungkinan akan meneruskan pelajaran di universiti. Dalam halkeadaan sedemikian, responden pempetisyen berhujah bahawa tanggungjawab perayu untuk menafkahi Anitha tidak terhenti, oleh kerana Anitha sememangnya mengalami suatu ketidakupayaan fizikal, yakni kebergantungan kewangan terpaksa. Berikutnya, responden memohon supaya perayu diperintah untuk terus menafkahi Anitha walaupun selepas Anitha berumur 18 tahun. Hakim yang bijaksana, mengikuti autoriti *Ching Seng Woah lwn. Lim Shook Lin*, bersetuju dengan hujah responden, dan dengan itu meminda Perintah dan melanjutkan tempoh pembayaran nafkah melangkaui umur 18 tahun jika anak-anak di sini berjaya mendapat tempat di mana-mana institusi pengajian tinggi. Perayu merayu dan berhujah bahawa hakim bicara telah khilaf dalam keputusannya, sambil memetik kes *Gisela Gertrud Abe lwn. Tan Wee Kiat* sebagai penyokong hujah. Persoalan penting yang berbangkit ialah sama ada, dengan memberi s. 95 Akta tafsiran yang sewajarnya, Perintah disini seharusnya terlupus *pro tanto* sebaik sahaja anak-anak tersebut mencapai umur 18 tahun.

Diputuskan:
Abdul Kadir Sulaiman HMR

[1] *Gisela Gertrud Abe* perlu dibezakan oleh kerana mahkamah-mahkamah disitu menggunapakai prinsip am s. 95 tanpa manfaat hujah-hujah berkaitan pengecualian ketidakupayaan yang terkandung di dalam seksyen tersebut.

[1a] Kami bersependapat dengan Mahkamah Rayuan dalam *Ching Seng Woah* bahawa dalam kes-kes yang sesuai, kebergantungan kewangan terpaksa adalah suatu ketidakupayaan di bawah s. 95 Akta. Bahkan, halperkara semasa ini adalah satu kes seperti itu. Kami malah harus pergi selangkah lagi dengan mengatakan bahawa kebergantungan kewangan terpaksa ini boleh juga dianggap sebagai satu ketidakupayaan mental di bawah seksyen berkenaan bagi maksud pengejaran pelajaran tinggi oleh anak-anak perkahwinan tersebut. Pastinya, badan dan fikiran yang sihat perlu bagi mengikuti pelajaran di peringkat tinggi.

[2] Sekiranya perkahwinan di sini tidak runtuh, perayu tentunya tidak akan membiarkan anak-anaknya merayau di jalanan dan hidup sendiri apabila mencapai umur 18 tahun. Mempertimbang hakikat ini, ianya tentulah bukan tujuan penggubal, apabila memasukkan peruntukan s. 95 ke dalam Akta, untuk membuatkan anak-anak ini menghadapi keadaan yang lebih buruk semasa berlaku perceraian berbanding dengan anak-anak yang hidup sebumbung bersama ibu bapa mereka. Oleh itu, hakim yang bijaksana adalah betul apabila membuat perintah dalam halkeadaan yang wujud melanjutkan pembayaran nafkah Anitha melangkaui tempoh selepas ia berumur 18 tahun.

[3] Pembayaran nafkah oleh perayu akan terhenti sebaik sahaja anak-anak di sini atau mana-mana seorang dari mereka boleh menjaga diri mereka sendiri. Maksudnya ialah, anak-anak tidaklah boleh semata-mata mengharapkan nafkah ibu bapa mereka tanpa berbuat sesuatu untuk hidup berdikari. Jika ini berlaku, tanpa apa-apa ketidakupayaan fizikal atau mental, sepertimana terma tersebut ditafsir sebelum ini, ianya adalah wajar bagi s. 95 digunapakai, yang bererti nafkah bagi mereka akan terhenti sebaik sahaja mereka mencapai umur 18 tahun. Sebaliknya, jika anak-anak gagal menjaga diri mereka sendiri apabila mencapai umur 18 tahun, ekoran kewujudan peluang untuk melanjutkan pelajaran guna menjamin kehidupan masa depan yang lebih baik, yang berakibat mereka tidak berbuat apa-apa untuk berdikari, maka mereka tidak boleh dinafikan hak untuk mendapat nafkah dari ibu bapa mereka.

[3a] Oleh yang demikian, mengambilkira pertimbangan-pertimbangan di atas, dalam keadaan-keadaan tertentu seperti keadaan kes semasa, s. 95 tidak harus dilihat secara sendirian dan berasingan. Seksyen tersebut harus ditafsir dengan lebih liberal dalam konteks tanggungjawab ibu bapa untuk menafkahi anak-anak mereka sepertimana yang termaktub dalam s. 92 Akta. Kesimpulannya, mahkamah ini bersetuju dengan pandangan seperti yang dikemukakan oleh hakim bijaksana dalam keputusannya di sini.

Rayuan ditolak.]

Case(s) referred to:
Ching Seng Woh v. Lim Shook Lin [1997] 1 CLJ 375 CA ***(foll)***
Gisela Gertrud Abe v. Tan Wee Kiat [1986] 2 MLJ 58 ***(dist)***
Gisela Gertrud Abe v. Tan Wee Kiat [1986] 2 CLJ 205; [1986] 1 CLJ (Rep) 133 SC ***(dist)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 83, 95

For the appellant - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co
For the respondent - YN Foo (Anand Porumudurai & En Mahendran); RR Chelliah Brothers

Reported by WA Sharif

JUDGMENT

Abdul Kadir Sulaiman JCA:

By a court order of 30 January 1997, the respondent had consented to several orders being made including para. (ii) thereof in the following terms:

> The Respondent is required to pay to the Petitioner (the respondent) a sum of RM4,200.00 (ie, RM1,400 per child) as maintenance for the three children of the marriage with effect from 1.1.97 and arrears amounting to RM60,000.00 by way of full and final settlement within three months from the date hereof.

Pursuant to the aforesaid order, the respondent made maintenance payments for all the three children, but in respect of Anitha a/p Karunairajah, the eldest child of the marriage, the payment made was only up to April 1998. By his letter dated 12 May 1998 the respondent informed that he would cease payment in respect of the child as she has attained the age of 18 years.

It is to be noted that the said consent order did not expressly state that the maintenance payments in respect of the children would cease upon them attaining the age of 18 years. It provided for the payment of RM1,400 per month per child effective from 1 January 1997. Hence, the implication generally is that the provision for maintenance in respect of the children was to be made until the children could fend for themselves, at least until they complete their first degree in tertiary education.

However, there is a provision in the Law Reform (Marriage and Divorce) Act 1976 ("the Act") in s. 95 which states:

> Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is **under physical or mental disability**, on the ceasing of such disability, which ever is the later. (emphasis added).

In other words, if a child is under such disability, the maintenance payment would continue to be paid even if the child's age is beyond 18 years.

Following the aforesaid notice and the cessation of payment in respect of the said eldest child by the respondent, the petitioner by a summons in chambers dated 2 December 1998, made an application to the High Court for an order to extend the making of maintenance payment in respect of Anitha until the completion of her tertiary or until further order.

Hence the issue before the High Court was whether the child in this case was suffering from any physical or mental disability to enable the court to make the order sought for.

Following the decision of the Court of Appeal in *Ching Seng Woah v. Lim Shook Lin* [1997] 1 CLJ 375, the learned judge found that the child was entitled to the extended maintenance payment, as she was suffering from involuntary financial dependence to pursue her tertiary education. According to the decision of the Court of Appeal, the involuntary financial dependence of a child of the marriage for the purposes of pursuing and/or completing tertiary education in order to obtain a first degree come within the exception provided for by s. 95 of the Act. The learned judge accordingly allowed the application of the petitioner by ordering that the said consent order be extended beyond the age of 18 years in the event that Anitha gains a place in any public or private educational institution of higher learning in order to obtain her first degree. Against this order of the learned judge, the respondent now appeals to us.

In making his decision, the learned judge distinguished the decisions in *Gisela Gertrud Abe v. Tan Wee Kiat* [1986] 2 MLJ 58 at first instance which later went on appeal to the Supreme Court reported in [1986] 2 CLJ 205; [1986] CLJ (Rep) 133 SC.

On 10 January 2001 we dismissed the appeal of the respondent against the learned judge's decision and we now provide the reasons therefor.

In *Gisela Gertrud Abe*, which facts are somewhat similar to the present matter before the High Court, an order for maintenance was made in respect of the two children of the marriage effective from 1 January 1979. In the course of time the respondent was unemployed for a period of seven months and so in arrears of the payment. Subsequently he found employment elsewhere with a reduced income.

He applied to the High Court under s. 83 of the Act to vacate the maintenance order made against him earlier for the period of his unemployment and to vary the amount of such maintenance after such period. In his application, he did not specifically seek to vary the maintenance order in respect of the children on the ground of s. 95 of the Act that the children were above the age of 18 years.

As the event turned, at the time of the application, the elder of the two girls was 22 and the younger would be 18 in the following month. The learned judge was satisfied that the respondent there had undergone a material change in his financial standing as to render it unjust by reason of such change to expect him to continue to be bound by the original maintenance order, which includes the order for the payment of maintenance to the two children of the marriage. On the mater of maintenance for the two children the learned judge has this to say at p. 60:

> This brings me to consider the position of the two children of the marriage and their entitlement to be maintained by their father, the respondent. The petitioner feels very strongly that she is duty bound to provide them with the best education which they are now receiving in England and she maintains that the respondent is morally bound to maintain them while they are there ... Under section 95 of the Law Reform (Marriage and Divorce Act) 1976, the duration of a maintenance order made in favour of a child expires, in the absence of any expressed shorter period, on the child attaining the age of 18 years. Reading this section, it is clear that it is a mandatory provision and that being the case, I consider that consideration of moral grounds is of no relevance whatsoever. To that end the respondent's legal responsibility to maintain the elder of the two children ended when she became 18 on December 8, 1980 and that of the younger daughter will end on May 31, 1985 when she too celebrates her eighteenth birthday.

Accordingly, at p. 61 she ruled as follows:

> Thus, from January 1984 until May 31, 1985, I hold that the respondent is only legally responsible for maintaining only the petitioner and the younger of the two children and having due regard to the respondent's liabilities, his sources of income and the petitioner's financial standing, I consider that RM800 will not be an unreasonable sum to expect from the respondent by way of maintenance and accordingly I vary the amount of maintenance from RM1,500 to RM800 effective from January 6, 1984. On the second daughter attaining her eighteenth birthday next month, this sum of RM800 is to be further reduced as the number of persons legally entitled to be maintained by the respondent will be reduced to one, the petitioner herself, and based on similar considerations of the financial positions of both the petitioner and the respondent, I reduce the amount of maintenance to RM400 and with effect

> from June 1, 1985, the amount of maintenance to be paid by the respondent to the petitioner shall be reduced from RM800 to RM400 per month and to that extent, the maintenance order of May 4, 1979 is further varied.

The wife petitioner, unhappy with the decision of the learned judge, went on appeal to the Supreme Court. There her appeal was allowed and the decision of the High Court was varied. It saw no good reason to differ from the learned judge in the exercise of her discretion regarding the part of the maintenance order during the seven months period of the husband's unemployment except to substitute "suspend" for the word "rescind" thereof. It substituted the figures of RM900 for RM800 per month from 6 January 1984 to 31 May 1985 and RM600 for RM400 each month from 1 June 1984 onwards. In any event the Supreme Court did say that an order for maintenance of a normal child of the marriage shall expire on the child attaining the age of eighteen years as so provided by s. 95.

Before the High Court and the Supreme Court in that case, the matter of disability of the child was not in issue. Therefore, in our view, this case is not the authority on the interpretation of s. 95 of the Act in particular, matters concerning the disability of the child of the marriage which forms one of the exceptions to the section, which can be distinguished from the present case before us.

Reverting back to the case of *Ching Seng Woah, supra,* which the High Court in the present appeal followed, there was a breakup in the marriage between the petitioner and the respondent. On 21 November 1994 the learned judge of the High Court ordered that the respondent pay RM1,000 per month for both children of the marriage, their medical bills, and their education up to tertiary first degree by way of maintenance. The respondent appealed to the Court of Appeal against the order. He urged that the learned judge should not have ordered any maintenance at all for each of the children beyond their 18th birthday relying on s. 95 of the Act. To this the Court of Appeal said at p. 387:

> At the trial, contrary to his answer in totally denying any liability for maintenance for his wife or children, the husband agreed in his evidence in chief to pay maintenance to his two daughters and support their education until they receive their first degree. In his final submission, the husband's counsel challenged the wife's right ... to any maintenance at all since she earned RM1,300 per month and he has now offered to take on the burden of the maintenance and education of his two daughters.

Having considered the provision of s. 95 of the Act the Court of Appeal went on to say at pp. 388-389:

> Mr Sidhu contends that this means that unless the exceptions apply, all orders for custody or maintenance shall expire on the attainment by the child of the age of 18 years. The exceptions are where the order itself specifically is for a shorter period, or the child is under physical or mental disability.
>
> When parents divorce, the children suffer the most. If Mr Sidhu is right, every able bodied child of 18 can be turfed out into the streets with impunity! Not only can they not look to their parents thereafter for money but also by inference for shelter in the matrimonial home! Section 95 could thus become the bohsia's charter.
>
> In the narrow context of this case, this submission is somewhat startling because it comes from a husband who in the court below undertook on oath and with the benefit of legal advice to maintain his daughters till they received their first degree, ie till they were educationally equipped to find their rightful place in the job market. It is a fundamental doctrine of law that a person cannot be permitted to reprobate what he has approbated. We therefore reject this submission.
>
> As to its wider implications, our view is that the powers provided for the protection of children by Pt VIII of our Act are additional to and not restrictive of the powers contained in Pts VI and VII. Part VIII, s. 95 in particular, has to be viewed in the context of a child who is not simultaneously faced with the break-up of the family homestead. The parental duties in this context are spelt out by s. 92 and it extends to accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.
>
> Here the two boys (daughters?) are both enjoying a tertiary education; and the issue is whether the court can direct the husband to provide for his daughters till their tertiary degree, **even if he had not undertaken to do so.** (emphasis added). The court's powers under s. 52 are very wide and transcend the limitations contained in s. 95, because s. 52 operates in a situation where the family is being legally disintegrated.
>
> Mr Sidhu did not canvas what the words 'physical or mental disability' in s. 95 meant. An 18 year old computer whiz-kid who is a wheel chair case and therefore well able to earn a living at that age could here be contrasted with another 18 year old who is physically and mentally fit but is otherwise totally unable to fend for himself on the job market. In the present case, we have no evidence of the accomplishments of the two daughters. However, we must take note that, unlike the United Kingdom and many other European countries, Malaysia is not a welfare state. Whilst the married women's claim to a share of the matrimonial assets is now entrenched in our laws, the rights of the

dependent young persons in these assets is yet to receive proper articulations. *Kulasingam v. Rasammah* [1981] 2 MLJ 36 was not cited to us, but that 20 year old daughter was claiming under the Married Women and Children (Maintenance) Ordinance 1950. Notwithstanding the definition of disability under s. 17 of the English Children's Act 1989 (also not cited to us but see *Bromley's Family Law* (8th edn) at p 643), we are inclined to the view that in appropriate cases, **involuntary financial dependence** is a physical disability under s. 95 of the Act. (emphasis added). There are far reaching social implications here and we would prefer to say no more now as to whether English attitudes are suitable to Malaysian conditions in such a case or its corollary which is the duty to aged and dependent parents by their progeny. We would however reiterate that the question of proper provision under s. 52 of the Act and the powers of property division under s. 76 (as opposed to providing maintenance simpliciter) could involve transfers of property not just for the benefit of the spouses *inter se* but also for the benefit of the dependent children.

At the time of the *decree nisi*, the elder daughter was just over 16 1/2 years and the younger just over 13 1/2 years. They had rights which had to be, and must have been, taken into account by the trial judge when she apportioned the assets as she did. Had either parent refused to maintain them, the court would have had to consider what independent right they had against the parental assets to secure their position (see s. 79 of the Act).

On the above analysis, the Court of Appeal dismissed the appeal by the husband/respondent with costs and affirmed the order of maintenance earlier made by the High Court in respect of both children of the marriage.

Back to the mainstream in this appeal before us now, the learned judge at the end of the day, came to the following conclusion:

In my view, the general principle which may be culled from the respective judgment of both the High Court and the Supreme Court (in *Gisela*'s case) is that the legal duty of a parent to maintain his or her child ceases when the child attains the age of 18 years. However, a careful reading of both the judgments makes it obvious to me that no view had ever been ventilated by the respective learned counsel therein relating to the application of the exceptions pertaining to eg, the physical disability brought about by a child's involuntary financial dependence for the purposes of pursuing and/or completing tertiary education in order to obtain a first degree, in which case, s. 95 creates an exception in that maintenance does not cease at the age of 18 years but would continue until the physical disability ceases. Hence this exception would entitle the child to maintenance beyond the age of eighteen years. In the circumstances, it is my view that both the High Court and the Supreme Court judgments are authorities only for the principle that as a general rule, under s. 95, the maintenance of a child shall cease upon a child

> of the marriage attaining the age of eighteen years. Both the High Court and the Supreme Court did not have the opportunity to hear submissions or decide on the question as to what constitutes physical disability under s. 95, which is the issue for determination by this Court in the instant case.

Guided by the decision in *Ching Seng Woah*, the learned judge accordingly varied the earlier consent order of 30 January 1997 by extending the maintenance payment beyond the age of 18 years in the event that Anitha and/or other children of the marriage do gain a place in any public or private educational institution of higher learning in order to obtain their first degree respectively, by concluding as follows:

> It is crystal clear that the decision of the Court of Appeal focuses specifically on the interpretation of the phrase "physical disability" which is directly and pertinently on the same issue before me. In the circumstances, I hold that this is the case in which I am bound to follow the decision of the Court of Appeal, pertaining to the continuance of maintenance in favour of a child of the marriage under a physical disability pursuant to Section 95, by reason of a child's involuntary financial dependence for the purpose of pursuing and/or completing tertiary education in order to obtain a first degree.
>
> Although it is true that in *Ching Seng Woah*, the husband had undertaken to maintain the children of the marriage till they receive their first degree, while the Respondent in the instant case has not given any undertaking, in my view, the difference is insignificant as it has been clearly elucidated by the Court of Appeal in *Ching Seng Woah*, at paragraph H of page 120 that the court can direct the husband to provide for his daughters till their tertiary degree, **even if he had not undertaken to do so.** (emphasis added).

Before us, the learned counsel for the appellant conceded that the maintenance order of 30 January 1997 was a consent order wherein the appellant did agree to pay a monthly sum of RM1,400 per child giving a total of RM4,200 for the three children of the marriage, as maintenance, and RM60,000 towards arrears of maintenance. However, by virtue of s. 95 of the Act, counsel submitted that the said order shall *pro tanto* expire on the attainment by each child of the age of 18 years unless the child suffers a physical or mental disability. He relied heavily on *Gisela Gertrud Abe*. But as stated by the learned judge, with whose view we agree, this case can easily be distinguished as the courts there applied the general principle in s. 95 without having the benefit of argument on the disability exception contained in the section.

To reiterate, on our part, we associate with the views expressed by the Court of Appeal in *Ching Seng Woah* mentioned earlier that in appropriate cases, involuntary financial dependence is a physical disability under s. 95 of the Act. Indeed the matter before us is such a case. We may even go a step further in

saying that this involuntary financial dependence can also be taken as a mental disability under the section for the purpose of the child of the marriage pursuing their tertiary education in order to be better equipped in their future working life. It needs able body and mind to undergo a tertiary education. A father with the mother together would not want their children to miss this golden opportunity of a tertiary education to be given to their children and indeed would be aspiring for it. More so in this case, when we look at the affidavit of the respondent in support of her application for continued maintenance payment beyond the age of 18 years. At para. 8 of her affidavit in support affirmed on 17 November 1998, she deposed as follows:

> 8. I crave leave of this Honourable Court to state that Anitha is currently pursuing her "A" levels in the United Kingdom and that the Respondent is not contributing in any way towards her education. It has been the intention of the Respondent all along for Anitha to pursue a career in medicine following his footsteps which compelled the Petitioner to send Anitha to the United Kingdom as it is common knowledge that one stands a better chance of obtaining the two "A" grades that are a pre-requisite to entry into medical college in the United Kingdom.

The appellant's reply to the averment was simply that he has been advised and verily believe that the right to receive maintenance ceases upon the child attaining the age of 18 years.

It is indeed unfortunate for the appellant and the respondent to have to undergo the breakup in their marriage. But for that their children should not be penalised. They would have wished that their parents would remain together with them under the same roof until such time they could fend for themselves in the work market. For the breakup of the marriage, they have to sacrifice their educational talent to pursue their studies at the tertiary institution because the father has refused to make provisions for them to do so hiding behind the strict interpretation of s. 95 of the Act. The pertinent question to ask is, if their marriage had not gone to the rock, would the appellant had left his children to wander in the street to fend for themselves upon their attaining the age of 18 years? Surely not. No sensible parents would have done that to their children. The relevant paragraph in the affidavit in support of the respondent's application mentioned earlier speaks volume of the wish of the appellant as to the future pursuit of Anitha, in particular. The future of the children's wellbeing would be his paramount consideration. It is our view, therefore, that it could not have been the intention of the legislator in incorporating the provisions of s. 95 into the Act to make the children worst off in the event of the breakup of the marriage of their parents compared to children living together with their parents under the same roof.

Therefore, the learned judge was correct in so making his order extending, in the circumstances, the payment of maintenance to the child beyond the age of 18 years for the reason given. Going on the facts of the present case, the children of the marriage, between the respondent and the appellant, including Anitha, are in the custody of the respondent. By s. 92 of the Act, it becomes the duty of either the appellant or the respondent to maintain or contribute to the maintenance of their children, whether they are in the respondent's or the appellant's custody, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to either of their parent's means and station in life or by paying the cost thereof. By the maintenance order of 30 January 1997, the appellant had consented to shoulder the responsibility of maintaining their three children by providing through the respondent, a sum of RM1,400 per month per child effective from 1 January 1997. The consent order does not expressly state as to when the maintenance payments in respect of them are to cease from being payable by the appellant. Of course, it will not go on forever. By necessary implication it will cease the moment the said children or any of them could reasonably fend for themselves. In the case before the learned judge, the appellant's means and station in life was not made an issue at all except that at whatever cost he maintains that under the Act he is no longer liable because the child had reached the age of 18 years except under physical or mental disability as provided for under s. 95 of the Act.

We advisedly said earlier that by necessary implication the maintenance payments by the appellant will cease the moment the said children or any of them could reasonably fend for themselves. By that we meant the children could not be expected to remain idle without any effort made to be standing on their feet but to live on the income of their parent simply because they are the children of the parent. In such a situation, without any physical or mental disability, in the sense we interpreted earlier, it is appropriate that s. 95 of the Act would apply in that the maintenance in respect of them would cease on their attaining the age of 18 years. But, on the other hand, if the children fail to fend for themselves upon attaining the age of 18 years for the opportunity available to further their education for a better future in life, then in not doing so, they cannot be deprived of their maintenance by the parent.

In the light of that, therefore, in certain circumstances such as the present, s. 95 of the Act should not be looked at in isolation. It may well be appropriate as a general principle to be applied notwithstanding the qualification provided for in the section. However, in a given situation such as in the present case, it should be construed in a more liberal fashion in the light of the duty imposed

upon the parent to maintain their children as embodied in s. 92 of the Act. We therefore, agree with the views expressed by the learned judge in arriving at his decision in this matter.

For the reasons stated, we dismissed the appeal with no order made as to costs and ordered that the deposit be refunded to the appellant.